EDITOR'S NOTE: See, Errata, dated November 7, 1988, appended to this decision at page 105 IBLA 75A.

THOMPSON BROTHERS COAL CO.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 86-1394 Decided October 18, 1988

Discretionary review of a decision of Administrative Law Judge Joseph E. McGuire, denying petition for review of civil penalty assessment and for review of the fact of the violation underlying Cessation Order No. 80-l-92-4. CH 4-7-P.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally--Surface Min-ing Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Generally

   No violation of the Surface Mining Control and Reclamation Act of 1977 occurred where, during the interim program for the regulation of surface coal mining in Pennsylvania, surface drainage was passed from one permit area to an adjacent permit and then passed through a sedimentation pond before leaving the second permit area, where both permit areas were embraced within the same mine drainage permit issued by the state regulatory authority.

APPEARANCES: Stanley R. Geary, Esq., Thomas C. Reed, Esq., Pittsburgh, Pennsylvania, for petitioner; William R. Stanley, Esq., Lynne N. Crenny, Esq., Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclama-tion and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Thompson Brothers Coal Company (Thompson) has filed a petition for discretionary review of a decision of Administrative Law Judge Joseph E. McGuire, denying a petition for review of a proposed civil penalty assessment and for review of the fact of the violation underlying cessation order (CO) No. 80-1-92-4. By order of July 22, 1986, this Board granted in part and denied in part Thompson's petition for discretionary review.

Notice of Violation (NOV) No. 80-1-92-5 was issued to Thompson by the Office of Surface Mining Reclamation and Enforcement (OSMRE) on or about March 14, 1980, charging a violation of 30 CFR 715.17(a). This regulation

is a part of the initial program regulations required by section 501 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. | 1252 (1982). Regulation 30 CFR 715.17(a) (1980) provided in relevant part:

> All surface drainage from the disturbed area, including disturbed areas that have been graded, seeded, or planted, shall be passed through a sedimentation pond or a series of sedimentation ponds before leaving the permit area. * * * Sedimentation ponds required by this paragraph shall be constructed in accordance with paragraph (e) of this section in appropriate locations prior to any mining in the affected drainage area in order to control sedimentation or otherwise treat water in accordance with this paragraph. [Emphasis supplied.]

The NOV charged that Thompson had failed to construct sedimentation ponds prior to any mining in the drainage area of permit No. 127-12(A).

Mining permit (MP) No. 127-12(A) was issued to petitioner on July 31, 1978, by the Commonwealth of Pennsylvania, Department of Environmental Resources (DER), describing 40 acres in Graham and Morris townships, Clearfield County, Pennsylvania. The application for this permit indicates that MP No. 127-12(A) was sought as an amendment to MP No. 127-12, which permit described an area contiguous to the 40 acres described above. One of the conditions imposed by MP No. 127-12(A) was the requirement that mining be done in accordance with the conditions in Mine Drainage Permit (MDP) No. 4473SM13. This latter permit had been issued on April 29, 1974, by DER for an area encompassing the land in both MP No. 127-12(A) and MP No. 127-12. In issuing MDP No. 4473SM13, DER approved plans for construction of industrial waste treatment facilities for operation of a coal mine not to exceed 171 surface acres. At all relevant times, the operator of a surface coal mine in Pennsylvania was required by State law to first obtain a mine drainage permit and then, in order to conduct mining activities, a mining permit.

On the basis of the evidence offered at a hearing held by Judge McGuire on February 5, 1985, the following facts were established. OSMRE field inspector Floyd J. Nyman, responding to a citizen's complaint, first inspected the area described by MP No. 127-12(A) in March 1980. On this occasion, Nyman observed drainage from the open pit on MP No. 127-12(A) passing into two adjacent mine pits (cuts) previously mined by Penn Brook (Tr. 91-92). The larger of the Penn Brook cuts is located partially within and partially beyond the boundaries of MP No. 127-12(A) (Tr. 111, 180). 1/ This Penn Brook cut served as a sedimentation pond for the drainage from the Thompson operation, and its use as such was approved by DER (Tr. 181). Inspector Nyman issued NOV No. 80-1-92-5 as a result of his inspection, though he did not observe drainage from the Thompson pit flowing beyond the boundaries of

1/ The smaller of the two cuts is beyond the boundaries of both MP No.127-12(A) and MDP No. 4473SM13. It was virtually ignored at the hearing. Like the larger of the cuts, it is depicted in blue on petitioner's Exhibit A.

MP No. 127-12(A) (Tr. 111). 2/ At the time of Nyman's visit, a treatment pond 3/ was located on the contiguous MP No. 127-12 to receive pit water pumped from the Thompson pit (Tr. 162).

The remedial action required by NOV No. 80-1-92-5 was to pass all surface drainage from the disturbed area through a sedimentation pond or series of sedimentation ponds before leaving MP No. 127-12(A) to meet the effluent limitations of 30 CFR 715.17(a) (Respondent's Exh. 1). Nyman extended the abatement period to allow Thompson 90 days to effect this remedy. Upon reinspecting MP No. 127-12(A) on June 12, 1980, and finding no change in the erosion and sedimentation controls, Nyman issued CO No. 80-1-92-4 (Tr. 93; Respondent's Exh. 2). This CO and the underlying NOV were terminated on October 7, 1980, at which time Nyman noted that petitioner had constructed a dam in its open pit, installed a water pump, and was pumping water into treatment ponds (Respondent's Exhs. 3 and 4). The proposed assessment attributable to CO No. 80-1-92-4 totalled $22,500, representing a penalty of $750 per day for 30 days (Respondent's Exh. 6).

Judge McGuire denied Thompson's petition for review because he found that the term "permit area," as used at 30 CFR 715.17(a), refers to "that geographical area covered by * * * surface coal mining permit No. 127-12(A), and not mine drainage permit No. 4473SM13, or even surface mining permit No. 127-12, or any other surface mining permit embraced by the larger geographic area covered by the mining drainage permit." Decision at 9.

In its statement of reasons, petitioner contends that Judge McGuire erred in limiting the term "permit area" to the 40 acres within MP No. 127-12(A). Petitioner argues that this term "must be determined as the entire area covered by mining permits and bonds within a single mine drainage area" (Statement of Reasons at 10, Aug. 22, 1986).

Petitioner explains that under the Pennsylvania practice in 1980, effluent limits and water treatment requirements for a surface mine were addressed in the mine drainage permit. 4/ Once these standards were established, Thompson states, the operator could mine increments of the mine

2/ OSMRE Inspector Nyman did not observe drainage from the Thompson pit flowing beyond the boundaries of MP No. 127-12(A). Judge McGuire's finding to the contrary is without support in the record (Tr. 111). Judge McGuire also incorrectly concluded that MP No. 127-12(A) amended MDP No. 4473SM13. This finding too is without any support in the record.

3/ A treatment pond is not defined by the regulations. Nile F. Linberg of DER described a treatment pond as a pond to which water from a pit is pumped for either treatment or settling depending on the nature or quality of the water (Tr. 192-93).

4/ Among the special conditions imposed on Thompson by MDP 4473SM13 was the requirement to construct treatment facilities and settling basins prior to activating the mining operation. Any water entering the mine pit either by man-made or natural causes was required to be channeled to a sump from which it would be pumped to a collection basin for neutralization and settling prior to discharge (Respondent's Exh. 5 at 7, 11).

drainage permit area upon obtaining individual mining permits which delineated the specific areas to be mined and for which reclamation bonds were posted. Thus, Thompson concludes that the area to be disturbed and the area covered by bonds on a mining operation, such as petitioner's Alder Run No. 1 Mine, included the combined areas of all mining permits located on the mine drainage permit area.

In opposing petitioner's argument, OSMRE argued, and Judge McGuire agreed, that the permit area, for the purposes of 30 CFR 715.17(a), is limited to an area within the specific permit, with the result that the movement of water from one permit area to another permit area constitutes "leaving the permit area," even though none of the water passes over any land which is not under permit. We cannot agree.

First of all, as a practical matter, such a limitation makes little sense. If there are two adjacent permits, each issued to the same operator, and surface drainage flows from the disturbed area of one through a disturbed area of the next one, but then enters a sedimentation pond prior to leaving the second contiguous permit area, it would seem that the intent of requiring a sedimentation pond has been met. It seems clear that, if the two permits were combined, OSMRE would agree that no violation had occurred. But, since the same acreage is under permit and bonding, what should it matter to OSMRE if there are one, two, or multiple different permits held by the operator? SMCRA should be concerned with results, not with how the results are ultimately accomplished.

Second, we believe that a fallacy in OSMRE's position is its reli-ance on the definition of "permit area" found at 30 CFR 701.5. In the first place, this is a permanent program definition, and petitioner was being regulated under the interim program. Thus, the definition is not applicable.

Furthermore, even if this definition did apply, application of OSMRE's interpretation of this regulation within the context of 30 CFR 715.17(a) leads to clearly ludicrous results.

The definition set forth at 30 CFR 701.5 provides:

> Permit area means the area of land, indicated on the approved map submitted by the operator with his or her application, required to be covered by the operator's performance bond under Subchapter J of this chapter and which shall include the area of land upon which the operator proposes to conduct surface coal mining and reclamation operations under the permit, including all disturbed areas; provided that areas adequately bonded under another valid permit may be excluded from the permit area. [Emphasis added.]

Under the proviso of this definition, it is possible to have two adjacent permits which overlap the same physical area. Thus, as in the instant

appeal, we might assume an operation which has commenced mining in an easterly direction; for reasons associated with topography, the operator determines to establish the required sedimentation ponds at the western edge of the permit. After mining has progressed from east to west and is beginning to approach the sedimentation ponds, the operator decides to open a new cut on land further west, land which is presently outside the permit. The operator elects to obtain a new permit. In the course of permitting, however, the operator reaches the conclusion that the already established sedimentation ponds could be utilized on this new permit as well. He therefore includes this acreage on his map. However, since the area covered by the sedimentation ponds are already under a bond, he utilizes the proviso to exclude the area of the sedimentation ponds from the permit area so that he will not be required to double bond.

The problem, however, is that, under the theory advocated by OSMRE, by doing so the operator has also excluded the sedimentation ponds from the second permit area so that any operations thereon are necessarily off-permit insofar as the second permit is concerned. Such a result, however, would negate the entire utility of the regulatory proviso, since it would effectively prohibit joint use of any land under two different permits unless the operator was willing to double bond. And, if the operator did not intend to use the same land under both permits, he would not have included it on the map he submitted in the first place. Thus, even if the definition found at 30 CFR 701.5 were applicable, adoption of the interpretation presently espoused by OSMRE would be fraught with difficulties. 5/

However, in the absence of any applicable definition of the term "permit area" insofar as the initial regulatory program is concerned, we believe that adjudication of the present appeal must be guided by the statutory definition of "permit area" set forth at sec. 701 of SMCRA, 30 U.S.C. | 1291(17) (1982). Therein, the term "permit area" is defined as "the area of land indicated on the approved map submitted by the operator with his application, which area of land shall be covered by the operator's bond as required by section 1259 of this title and shall be readily identifiable by appropriate markers on the site."

The initial question is, therefore, what is the application within the context of the present appeal? This question is complicated by the

5/ It is clear that, in promulgating the proviso to 30 CFR 701.5, OSMRE intended to avoid the necessity of double bonding. Thus, in the preface to the final rulemaking, OSMRE declared: "The final rule retains the provision from the proposed rule allowing the exclusion from the permit area of areas adequately bonded under another valid permit. This provision is considered appropriate since each bond must be adequate to cover the anticipated costs of reclamation of the area involved, and therefore, duplicative bonding is unnecessary." 48 FR 14820 (Apr. 5, 1983). As indicted in the text of this decision, the interpretation by OSMRE espoused in the present appeal would totally nullify this expressed intent.

fact that, as indicated above, when this appeal arose the Commonwealth of Pennsylvania required two distinct permits as a precondition to conduct surface mining, a mine drainage permit and a mining permit.

The mine drainage permit would delineate the entire watershed or watersheds possibly affected or influenced by mining (Tr. 60-61). Appellant filed for a mine drainage permit in 1973 and submitted maps therewith which depicted the entire area embraced by the proposed mine drainage permit (Respondent's Exh. 5 at 7; Petitioner's Exh. B). This permit was issued in 1974.

A mining permit, on the other hand, would describe land within the mine drainage permit on which surface mining was to be conducted, and surface mining was confined to the bonded areas within the mining permit (Respondent's Exh. 5 at 1). An operator could obtain more than one mining permit describing distinct lands within the mine drainage permit area. Id. at 4. Petitioner, in point of fact obtained two mining permits within the larger mine drainage permit. Both the mine drainage permit and the mining permit, however, were essential prerequisites to operation of a surface mine.

In the absence of a controlling regulatory definition, we feel compelled to construe these two types of permits in pari materia. In other words, during the interim program, where two separate, but adjacent, mining permits had been issued within the boundaries of a single mine drainage permit, the flow of drainage across one boundary of a mining permit onto land within the adjacent mining permit did not constitute a violation of 30 CFR 715.17(a), provided that the land within both permits was adequately bonded as required by SMCRA. Since these are the facts in the present case, it follows that the decision of the administrative law judge in sustaining the CO and affirming the civil penalty assessment must be reversed.

Inspector Nyman did not see water leaving the permit area of MP No. 127-12(A). What he observed was the absence of sedimentation ponds on the permit area of MP No. 127-12(A). This circumstance, standing alone, was not sufficient to show that there was no sedimentation pond on the "permit area" at issue here, since the permit area was not limited to MP No. 127-12(A) alone, as the inspector (and later the Administrative Law Judge) incorrectly assumed, but encompassed the greater area of the adjacent permit MP No. 127-12 as well. Proof that there was no sedimentation pond on permit MP No. 127-12(A), therefore, was inconclusive. To establish that there had been a failure to construct a pond on the permit area, there should have been proof there also was no pond on permit MP No. 127-12. It was error to restrict the term "permit area" in this case to mean only permit MP No. 127-12A. Judge McGuire's decision must therefore be reversed because it erroneously holds that OSMRE satisfied its burden of persuasion in proving a violation of 30 CFR 715.17(a) by such an incomplete showing as was here made. As a necessary result, the holding below that finds petitioner failed to timely abate the violation charged and assigns a civil penalty in the amount of $22,500, must also be revised.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge is reversed and the CO is vacated. 6/

Franklin D. Arness
Administrative Judge

I concur:

James L. Burski
Administrative Judge

6/ We note that this action may be deemed inconsistent with dicta appearing in P & K Coal Co. v. OSMRE, 98 IBLA 26 (1987), to the effect that unless an NOV has previously been challenged it may not be contested during proceedings concerning a subsequent cessation order. We decline to follow this dicta, which appears not to have been fully considered in the P & K decision, for the reason that the doctrine of administrative finality, relied upon in P & K, does not appear to require such a procedure.

November 7, 1988

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ERRATA

The following correction is hereby made to the above-captioned decision:

1. At page 74 line 44 is changed by deleting the last word in the line "revised" and substituting the word "reversed."

Franklin D. Arness
Administrative Judge

APPEARANCES:

Stanley R. Geary, Esq.
58th Floor, 600 Grant Street
Pittsburgh, Pennsylvania 15219

William R. Stanley, Esq.
Office of the Solicitor
U.S. Post Office & Courthouse
Pittsburgh, Pennsylvania 15219